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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1121

RICHARD A. PETREE, SR.

VS.

THE STATE OF GEORGIA

BRIEF IN RESPONSE TO PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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SUBJECT INDEX

	Page
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Questions Presented	2
Statement of the Case	3
Argument	3
I. Was any substantial federal question presented to or decided by the state court?	3
II. Is *Dunn v. United States* good law since *Ashe v. Swenson* was decided?	8
Conclusion	11
Certificate of Service	12

TABLE OF CASES

Page

Ashe v. Swenson,
397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469(1970) 2, 9

Benton v. Maryland,
397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 707(1969) 8

Coleman v. Alabama,
399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387(1970) 5

DeBacker v. Brainard,
396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148(1969) 2, 7

Dunn v. United States,
284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356(1932) 2, 8

Gillars v. United States,
182 F.2d 962 (D.C. 1950) 9

Murdock v. City of Memphis,
20 Wall. 590, 22 L.Ed. 429(1874) 1

People v. Amick,
20 Cal. 2d 247, 125 p. 2825(1942) 10

Steckler v. United States,
7 F.2d 59 (2nd Cir. 1925) 8

Taylor v. State,
42 Ga. App. 443, 156 S.E. 623 (1931) 6

Taylor v. State,
44 Ga. App. 387, 161 S.E. 793 (1931) 6

United States v. Abrams,
427 F.2d 86 (2nd Cir. 1970) 6

TABLE OF CASES—continued

Page

United States v. Fox,
433 F.2d 1235 (D.C. 1970) 9

United States v. Panzavecclina,
446 F.2d 1293 (5th Cir. 1971) 9

United States v. Smallwood,
443 F.2d 535 (8th Cir. 1971) 9

Wolfe v. State of North Carolina,
364 U.S. 177, 80 S.Ct. 1482,
4 L.Ed. 2d 1650 (1960) 1

STATUTES

Chapter 26-23,
Criminal Code of Georgia 6

Section 26-2301
Criminal Code of Georgia 3, 4, 6, 7

Section 26-2304
Criminal Code of Georgia 3, 4

Georgia Laws 1968, p. 1249 6

MISCELLANEOUS

Committee Notes, Chapter 23-26,
Criminal Code of Georgia (Pamphlet), p. 147 6

18 ALR 3rd 259 (1968) 9

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JURISDICTION

Jurisdiction is not conceded. The respondent contends that the judgment of the Georgia Court of Appeals of which review is here and now sought rests on independent and adequate state substantive grounds (*Murdock v. City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1874); *Wolfe v. State of North Carolina,* 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed. 2d 1650; rel. den. 364 U.S. 856, 81 S.Ct. 29, 5 L.Ed. 2d 80 (1960)).

While perhaps not strictly jurisdictional it would seem

that, as was the situation in *DeBacker v. Brainard,* 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148 (1969), this case does not present a factual situation sufficient as a basis for the ruling the Court is invited to make. In other words, the Petitioner's problems are not of true constitutional dimensions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petition contains all such that are deemed applicable.

QUESTIONS PRESENTED

I.

WHETHER ANY SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED TO OR DECIDED BY THE STATE COURT.

II.

WHETHER THE RULE OF *DUNN V. UNITED STATES*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356, (1932), THAT CONSISTENCY BETWEEN VERDICTS OF ACQUITTAL AND OF CONVICTION ON COMPANION COUNTS OF AN INDICTMENT RETURNED BY A SINGLE JURY IS NOT NECESSARY, HAS BEEN ERODED COMPLETELY OR IN PART BY THE RULINGS IN *ASHE V. SWENSON*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d. 469 (1970) THAT COLLATERAL ESTOPPEL IS PART OF THE DOUBLE JEOPARDY GUARANTEE, AND ITS APPLICATION A MATTER OF "CONSTITUTIONAL FACT".

STATEMENT OF THE CASE

Petree, an Atlanta Alderman, and Ansley, an attorney of the Atlanta bar, were jointly indicted and tried upon a two-count indictment charging violations of two different provisions in the Criminal Code of Georgia penalizing misconduct by public officials and their confederates.

The trial judge refused to require an election between the counts by the prosecution, but in his instructions required the jury in the event of a finding of guilt on either count to acquit on the other. Both were acquitted on the first count, both convicted on the second.

Petree has been unsuccessful in getting his conviction overturned by the Georgia Court of Appeals or Supreme Court and now petitions this Court for the Writ of Certiorari to the Georgia Court of Appeals.

ARGUMENT

I.

WAS ANY SUBSTANTIAL FEDERAL QUESTION PRESENTED TO OR DECIDED BY THE STATE COURT?

As to repugnancy and inconsistency of the verdict the State Court held:

> "7. Finally, we reach the contention that the verdicts of not guilty of Count One and guilty of Count Two are repugnant and inconsistent. Obviously the indictment purports to allege aspects of the same conduct to state two offenses based on the same transaction, the first under Code Sec. 26-2301(2) and the second under Code Section 26-2304(b).

The meaning of the offense set forth in Code Sec. 26-2301(2) is dependent upon the language of Code Sec. 26-2301(1) with respect to the purpose for which the person 'solicits or receives' and is thus restricted to 'influencing *him* in the performance of any act related to the functions of *his* office or employment' (emphasis added) whereas the purpose under Sec. 26-2304(b) is 'an agreement to procure or attempt to procure the passage or defeat the passage of any legislation' which includes solicitation for the sale of influence by the perpetrating officer or employee, who might or might not be a member of the legislative body, on others, members of the legislative body, to assure the passage or defeat of legislation. Thus to the extent that it is alleged under Count One that Petree, with Ansley as his abettor, solicited the sale of his own vote as a member of the legislative body, the alleged transaction is an offense under Code Sec. 26-2301(2), but should it appear that the solicitation was for an agreement, expressed or implied, to procure or attempt to procure the passage or defeat of legislation, it involves the attempted sale of his influence on other members of the legislative body, and comes under Code Sec. 26-2304(b). In brief, we see a distinction in accusing Petree, in conjunction with Ansley, of soliciting the sale of his own vote, and in accusing him in conjunction with another, of soliciting the sale of his influence in procuring favorable legislative action, which might or might not include his own vote. Thus, from the standpoint of conviction and acquittal, an acquittal under Count One of the indictment as alleged is not, as a matter of law, inconsistent and repugnant to a simultaneous conviction of Count Two. Accordingly, the rule in *Kuck v. State*, 149 Ga. 191 (99 SE 622), and similar cases is inapplicable to the present case. See *Blair v. State*, 81 Ga. 629 (7 SE 855).

> We recognize further that the trial judge, having refused to require the State to elect upon which count it would proceed, acted favorably to the defendants in requiring the jury in the event of a finding of guilt on one count, to acquit on the other. Even if two separate offenses were alleged, for reasons already stated, the action of the trial judge is consonant with the guidelines stated in Code Sec. 26-506(a) which protect an accused from a conviction 'of more than one crime if (1) one crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."

This construction of the Georgia Criminal Code is binding upon this Court. *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970).

The State Court has simply held that by two separate provisions the Georgia General Assembly has made penal the selling by a municipal legislator of his own vote on a particular measure and the selling by the same legislator of his influence on his fellow members, which as a practical matter amounts to selling his vote on past and future measures in which his fellow members have been and will be interested.

In view of the magnitude of the evil inherent in venality on the part of public officials no reason appears why one could not be convicted and punished under either or both provisions for the same transaction. In a small legislative body there is no reason whatever why a member can not procure the passage of a measure without himself voting for it, or even when he himself votes *against* it. His fellow-members would readily understand that he could feel compelled to vote and vote *against*

that which he was personally *for* because of the strong feelings *against* of a majority of his constituents.

The verdict was not necessarily inconsistent, either logically or legally. In *United States v. Abrams,* 427 F.2d 86 (2nd Cir. 1970) it was held that an acquittal on a related count could not undermine the correctness of a conviction on another count where there was no more than possible inconsistency in the jury verdict. *Dunn* was cited as authority. Certiorari was denied, 400 U.S. 832, 91 S.Ct. 64, 27 L.Ed.

The Criminal Code of Georgia was revised and re-enacted by Georgia Laws 1968, pp. 1249 et seq., effective July 1, 1969. The committee notes to Chapter 26-23, which contains both sections referred to by the Georgia Court of Appeals, state that Section 26-2301 replaces a dozen sections of the former Criminal Code defining bribery, essentially originating in the common law. As to Section 26-2304, paragraph (a) had its origin in a 27-Section "Honesty in Government" statute enacted in 1958, applicable primarily at the state level, while paragraph (b) had its origin in the local government counterpart of the "Honesty in Government" law, enacted in 1964. Committee Notes, Chapter 26-23, Abuse of Governmental Office, Criminal Code of Georgia, 1971 Revision (Pamphlet) pp. 147, 148.

The Georgia Court of Appeals had held in *Taylor v. State,* 42 Ga. App. 443 (156 S.E. 623) (1931), and *Taylor v. State,* 44 Ga. App. 387 (161 S.E. 793) (1931), that the procuring of the passage and adoption of an ordinance of the Atlanta City Council by the Clerk of that body for pay was not an offense under the then existing bribery laws (principal progenitors of present

Section 26-2301 and couched in similar language). There was a special concurrence in the first decision, a dissent to the latter.

The rationale of the Court in the two cases involving *Taylor* and in Petree's case is the same.

It thus appears that there can be no pretense that the state court adapted its view in order to evade a constitutional issue. The case having been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong. (*Wolfe v. State of North Carolina,* supra).

In addition, the Georgia Court approved the action of the trial judge in requiring an acquittal upon either count of the indictment in the event of a conviction upon the other. This appears to be all that *Ashe v. Swenson,* supra, could require, and to eliminate any vestige of a federal question.

In *DeBacker v. Brainard,* 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148 (1969), this Court declined to consider whether the preponderance of evidence standard in a Nebraska statute relating to Juvenile Court proceedings satisfied Fourteenth Amendment due process requirements, finding consideration not appropriate in the circumstances of the case. The circumstances pointed out were that the juvenile's counsel at the juvenile court hearing finding the juvenile to be a delinquent child did not object to application of the preponderance of evidence standard, and admitted in oral argument before this Court that the evidence would have been sufficient to support a finding of delinquency even under a reasonable doubt standard.

Petree was tried one time, convicted of one offense,

and has received one sentence. Thus far there has been no question as to the sufficiency of the evidence. It would seem most inappropriate from these facts as a base to go into consideration of complicated questions of collateral estoppel and double jeopardy.

The first question should be answered in the negative.

II.

IS *DUNN V. UNITED STATES* GOOD LAW SINCE *ASHE V. SWENSON* WAS DECIDED?

Although not expressed, Petitioner obviously contends that when *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969) made the fifth amendment double jeopardy provision applicable to the states through the Fourteenth Amendment it made applicable also the federal court decisions on former jeopardy, and that these decisions support his position. With this last we take issue.

This Court, speaking through Mr. Justice Holmes, in *Dunn v. United States* (284 U.S. 390, at p. 393) held that consistency in a verdict is not necessary and quoted with approval from Judge Learned Hand's opinion in *Steckler v. United States*, 7 F.2d 59, 60 (2nd Cir. 1925):

> '"The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'"

There was a vigorous dissent by Mr. Justice Butler (commencing at p. 394).

What should be required is consistency within individual counts and an ample evidentiary base for conviction. (*Gillars v. United States*, 182 F.2d 962, 966 (D.C. 1950)).

Dunn has been followed and is being followed in all of the circuits. See the three pages of citations in the annotation in 18 ALR 3d 259, Sec. 3, commencing at p. 274, and in the same section in the current pocket supplement, also *United States v. Smallwood*, 443 F.2d 535, 543 (8th Cir. 1971); *United States v. Panzavecclina*, 446 F.2d 1293, 1296 (5th Cir. 1971); *United States v. Fox*, 433 F.2d 1235 (D.C. 1970). In *Fox*, Chief Judge Bazelon in a special concurrence (433 F.2d at p. 1239) suggests that there is a question whether *Dunn* has survived *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469.

In so far as *Dunn* rests on the proposition stated in the opinion that each count is regarded as a separate indictment, and if the indictments had been separately prosecuted on the same evidence, an acquittal on one count would not have been res judicata on the others, the "same transaction" test in *Ashe*, along with the doctrine of collateral estoppel, probably would leave *Dunn* emasculated. But *Dunn* does not depend entirely, or even principally upon application of the "same evidence" rule.

Of equal or greater importance in *Dunn* is the quotation from *Steckler v. United States*, recognizing that a jury is not a computer or a calculator or even an adding machine. Juries are composed of men, and as such capable of being influenced by emotion as well as by reason. It recognizes also something that seems to be overlooked because an acquittal by a jury is not appealable, that in

cases such as we are now discussing it could be argued with equal force and logic that the verdict of acquittal is void for inconsistency because the guilty verdict establishes the existence of all necessary facts and that the jury believed them proved beyond a reasonable doubt. This may be another instance of the difficulty of applying the doctrine of collateral estoppel in criminal prosecutions, alluded to by the Chief Justice in his dissent in *Ashe*.

It would appear that the practicalities favor taking jury verdicts on multiple count indictments at face value without attempting to harmonize or reconcile the findings. As far as the defendant is concerned, the acquittals are then acquittals and the errorless convictions are then convictions, and the incidents of each those provided by law.

The ALR annotation to which we have already referred was prepared in 1968. In 136 pages it treats the subject of inconsistency in criminal verdicts exhaustively. It appears that a decision by some Appellate Court can be found in support of any conceivable position. However, the rule in *Dunn* appears unquestionably to be the majority rule. In California the rule appears to be statutory. *People v. Amick*, 20 Cal. 2d 247, 125 p. 2d 25 (1942).

Under the foregoing authorities, the second question should be answered in the negative.

CONCLUSION

The writ should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carter Goode, hereby certify that I have this day deposited three copies of the within and foregoing brief in response to petition for the writ of certiorari in a United States mail box, with first class postage prepaid, addressed to Thomas H. Antonion, Esq., counsel of record for Richard H. Petree, Sr., petitioner, at his address of record, 1421 Candler Building, 127 Peachtree Street, N.E., Atlanta, Georgia 30303.

This.....day of May, 1972.

CARTER GOODE
Of Counsel for Appellee